No. 13562

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

FRANK LUEHR and JONES STEVEDORING COMPANY, a corporation,

Appellees.

On Appeal From the United States District Court for the Northern District of California, Southern Division.

BRIEF FOR APPELLEE FRANK LUEHR.

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Introduction.

By and large, this appeal presents purely factual questions wherein appellant United States is attempting to relitigate in this court factual issues which were all resolved against it in the trial Court. A review of the evidence and applicable authorities will demonstrate that the Government's appeal is entirely without merit.

Summary of Argument.

I.

The Government was plainly negligent and therefore liable for damages in dropping the airplane on appellee Frank Luehr. Luehr himself was free of any contributory negligence proximately causing the accident.

II.

The trial Court made a lump sum award of damages to Luehr in the amount of $125,000. The right of the Government to reduce this award under its anti-subrogation agreement with the employer Jones Stevedoring Co. and its carrier Firemen's Fund Insurance Co. on account of compensation payments and medical services rendered to Luehr by them was not raised by the pleadings nor litigated in the Court below and cannot now be litigated here. The fact that compensation payments were made and medical services provided does not of itself entitle appellant to *pro tanto* reduction of the judgment as against Luehr, but appellant must litigate this claim in a separate suit against the employer and its carrier in which appellee Luehr has no interest.

III.

The injuries were extensive, severe and disabling. The damages suffered by Luehr were enormous. The award of $125,000 made to him was supported by substantial evidence and is most reasonable. There is no basis to reduce the damage award.

IV.

The judgment in its entirety is supported by substantial and convincing evidence and while an admiralty appeal is a trial *de novo,* there is no basis for reversing the judgment in the absence of clearly reversible error. There is no such error even suggested by the record in this case.

V.

The damages should be increased. Luehr has suffered additional injuries and medical expenses since the trial which are greater than anticipated at the time of trial. Evidence should be taken in this Court on the matter of Luehr's additional injuries and damages.

I.

Appellant United States Was Admittedly Negligent. Appellee Frank Luehr Was Free of Negligence.

The liability aspect of this case is purely factual. As far as we can see, there are no disputed questions of law involved. Elementary principles of maritime tort liability apply.

Where one engaged in a ship loading operation, such as the Government was performing here, is negligent, through the acts of a servant, liability follows.

American Stevedores v. Porello, 330 U. S. 446, 91 L. Ed. 1011, 1947 A. M. C. 349;

Sieracki v. Seas Shipping Corp., 328 U. S. 25, 90 L. Ed. 1099;

The Max Morris, 137 U. S. 1, 34 L. Ed. 586;

Porello v. United States (C. C. A. 2), 153 Fed. 2d 605;

Pool Shipping Co. v. De Groat (C. C. A. 5), 112 Fed. 2d 245;

Baccile v. Halcyon Lines (C. C. A. 3), 198 Fed. 2d 403;

Rothschild Stevedoring Co. v. United States (C. C. A. 9), 183 Fed. 2d 181;

Kulukundis v. Strand (C. C. A. 9), No. 13229, decided March 10, 1953.

The Government concedes that it was negligent when the crane operator Bailey disengaged the lever releasing the cable which caused the jet airplane to fall on appellee Frank Luehr.

The Government seeks to avoid the consequences of its admitted negligent acts in two ways, first, by claiming

that there was negligence on the part of the Jones Stevedoring Co., Luehr's employer, in ordering him into a dangerous place to work and, secondly, that Luehr himself was negligent by going under a load being landed.

Before the Government concluded the trial with the positions just stated, it had asserted a number of other theories designed to relieve itself of liability. Amongst these were the arguments that the stevedore employer should have built stagings for Luehr and the other longshoremen to stand upon while the planes were being loaded, or should have provided other means so that the longshoremen would not have had to stand upon the mechano deck. [See testimony of the witness Lehmkuhl, R. 582-589.]

This argument was directed against the Jones Stevedoring Co. but the Government was apparently unconvinced that the argument had any merit and so abandoned it. At least it was not seriously argued at the trial and is not argued at all on this appeal.

It is not necessary, of course, for Luehr to argue the point that his employer was not negligent in directing him to work as he did. That is not his legal concern. Even if Luehr's employer was negligent (which it was not) such negligence cannot be imputed to the employee Luehr.

Rothschild Stevedoring Co. v. United States, supra.

Appellee Luehr does argue and take issue with the Government's contention that he himself was negligent in "going under the load."

In this connection, Luehr states, first, that he did *not* go under the load, and secondly, that he was *working as directed* by his superiors and that as a conscientious workman he followed orders.

Furthermore, the Government's entire argument on this score completely dissolves in the light of the actual situation as disclosed by the testimony which demonstrates that Luehr *did not go under the load* as it was being lowered, but *waited* until it reached almost *shoulder height,* and then *approached* the plane to *grab hold and guide it in,* when suddenly it fell without warning and with such speed and force as though "the falls were cut."

Thus Ted Spirz, in charge of the operation for the stevedoring company, testified:

> "Q. (By Mr. Resner) Now, did you see Mr. Luehr right before this accident? A. Well, yes, when I was standing here (indicating).
>
> Q. You said here, on the catwalk, you have indicated on the catwalk? A. Yes, and the plane was coming over, all tag lines were taken care of, I looked inshore when I saw Mr. Luehr standing over here by the stays, and *we waited for the plane to come down,* and when the plane *stopped and we were ready to take over and hold onto it,* I saw Mr. Luehr coming over and *grab* hold of that, the left rear landing strut stand, I presume that is what it was, that is where he was.
>
> Q. That was his job there? A. That is his job, to hold onto the plane and steady it.

Q. Was he doing what he was required to do at that particular time? A. That is correct." [R. 114-115.] (Emphasis ours.)

Martin Ingbrigtsen, the gang boss, *who was called as a witness by the Government,* testified as follows:

"Q. (By Mr. Harrison) The walking boss told you to send a man up there? A. Yes, and this gentleman, (Luehr) he was nearest to me, so *I asked if he would go up there,* please.

Q. Just before the accident happened, Mr. Luehr was standing near to you on the same deck, is that correct? A. Yes, he was on deck, yes, but *when the plane come in I told him to go up and steady it.*

Q. You told him to go up and steady the plane? A. That was orders from Mr. Spirz; get a man up there.

Q. Pursuant to order from Mr. Spirz? A. That is right.

Q. Did Mr. Luehr go up there? A. He did.

Q. Did you watch what he was doing when he got up there? A. He was *standing by* to *steady the plane* when it come down.

Q. He was standing by to steady the plane? A. Yes. He had to get some blocks to put underneath the plane." [R. 538.] (Emphasis ours.)

* * * * * * * *

"Q. (By Mr. Resner) Mr. Ingbrigtsen, Mr. Luehr was working there where he was supposed to be, was he? A. Either him or somebody else.

Q. Either him or somebody else? A. Yes. *We had to have the man there.*

Q. You had to have a man there? A. Yes, sure." [R. 539.] (Emphasis ours.)

Mr. Luehr himself testified that he was where he was supposed to be and that he was following orders.

"Q. (By Mr. Resner) Now, Mr. Luehr, I want you to tell the judge just what you were doing and what you saw and what happened with regard to how this accident happened? A. Well, the best I remember is that while this plane was being hoisted off the barge and it probably was around forty feet in the air—that is off the deck, and it has to be that high to clear all the stays and other obstructions on the ship so it won't be damaged in any way.

As the plane was being taken over to the port side of the ship, it was lowered and maybe it stopped once or twice so that the plane, the wings, the fuselage not being damaged in any way. I was on the main deck, and after the plane was coming down I got up on the mechano deck. There is no way of getting up there but climbing up. There is no stairway. *I was standing way out on the outer edge as the plane was coming down, and it stopped,* I think, within about six feet of the mechano deck. What I mean, six feet of the bottom of the fuselage on the mechano deck." (Emphasis ours.)

* * * * * * * *

"A. I remember the *whistle man giving the signal to stop the plane, and it did stop;* and as it did *I moved forward a few steps,* maybe four or five, to get in the position that I was, *so I could help steady the plane.* There is no way of getting hold of the plane outside of probably the strut with one hand and the fuselage with the other." (Emphasis ours.)

* * * * * * * *

"Q. (by Mr. Resner) What were you standing on, Mr. Luehr? A. Well, I was standing on this

mechano deck. I don't know just exactly how wide they are. Seems to me they are about six or eight inches wide.

Q. Were you standing on one of the solid beams? A. Yes."

* * * * * * * *

"A. That is correct. You had to stand in that kind of position on the mechano deck to brace yourself. In holding that plane with your left hand on a strut and your right hand on the fuselage, evidently you will have to be pretty close to the plane or—probably the wing would probably be just about over your shoulder, or the fuselage. I don't remember just exactly.

But *all of a sudden something gave way as though a line was cut.* It dropped and it hit me on my left shoulder and threw me forward with a great crash. I landed head first down toward the deck." [R. 292-294.] (Emphasis ours.)

And in response to Mr. Harrison's questioning, Luehr explained that he was steadying the plane.

"A. . . . I was on this beam on the inshore side. *I wasn't in any way of the plane* if it would have dropped that I would have got hurt at that time. But as the plane was coming down to about, I would say, six feet, I mean between—of the mechano deck, the plane to the mechano deck, *the plane stopped.* The man, what they call the *whistleman, blew his whistle, and the plane stopped,* and *as it stopped I walked forward to help steady the plane.*" [R. 340.] (Emphasis ours.)

And again Luehr testified:

> "A. . . . Now, when *I had hold of this plane trying to steady it—the whole plane dropped so fast.* Now just exactly what hit me, whether the fuselage or the wing, I don't remember, but *it dropped just as though the line was cut,* and the whole plane—I don't know what it weighs, probably four ton, five ton, I don't know what it is came down so fast it hit me on my left shoulder, and as it did it threw me forward with my head hanging to the main deck." [R. 341.] (Emphasis ours.)

One of the *key witnesses* in the case was Charles Cates, a Government employee who acted in the capacity of *whistleman,* (referred to in the preceding testimony). His deposition on discovery was taken by appellee Luehr prior to trial and is an exhibit on this appeal. [R. 732.] Since he was a *Government employee* and a *key witness* it was obviously the *duty* of the *Government* to *produce* him as a *witness* in this case. That the Government *refused* to do. [R. 283.] Such being the case, a clear and compelling inference follows that the testimony of this key witness would be adverse to the Government.

Such not only is the inference, *it is the actual fact.* On his deposition, the whistleman, Cates, testified that Luehr was at a place where he was *supposed to be.* In the Cates deposition, at page 24, the following appears:

> "Q. (by Mr. Resner) Had you noticed him there before the accident? A. *Well, all these men working there would have to be in a position like that and steady the plane as you maneuver it around.*
>
> Q. There in the position, then, where they were supposed to be to land the plane? A. *They were*

supposed to be there. That is where they were told to be.

Q. *And that was their station and that was Mr. Luehr's station?* A. *That's right.*

Q. Now, you didn't notice Mr. Luehr particularly? A. No, I didn't.

Q. Any more than these other longshoremen there? A. That's right." (Emphasis ours.)

The trial Court early in the trial recognized the fact that whether the loading operation was dangerous or not, it was being done the only way it could be done:

"The Court. He (Spirz) has outlined a situation here, the necessity, whether it is dangerous or not, in order to land the plane, get it in place, the man has to get under it, and that is dangerous." [R. 126.]

The answer was given by Spirz:

"I consider it dangerous to a certain extent if the load falls, you're under it, you have to get under it to land that plane, have to be underneath it, have to hold that tripod and three stands, and under that plane, hold on to the tripod, and it is suspended, if something happens, you are under it, and that is it. But *you can't land that plane by standing ten feet away.* You have to hold on to that stand." [R. 126.] (Emphasis ours.)

It is abundantly clear that Luehr was in a place where he was supposed to be, had to be, and was told to be; that he was doing the job in a correct way, in the way that

it always had been done, and in the only practical way that it could be done.

Concededly, stevedoring is dangerous work. That is one of the reasons why such exacting liability is imposed upon third persons whose negligence or whose unseaworthy vessels or gear causes injury to a longshoreman. (*Cf., Sieracki* case, *supra.*)

The fact that Luehr was doing a dangerous job or that he was in a place where an accident might occur does not change the situation from what occurs a thousand times a day in the loading and unloading of ships. The fact, however, that stevedoring is hazardous work does not relieve a negligent party, such as the Government in this case, from the consequence of its negligent conduct.

In this case, not only was the Government negligent but its negligence was *the proximate cause* of the accident. The fact that Luehr was where he was or that he was sent to that place to do his work did not cause the accident. *The active force which produced the accident was the negligent act of Bailey in dropping the plane.* That was the *effective, producing, causative* factor of the accident, its proximate cause. For these reasons liability fastens upon the Government.

> *Porello v. United States* (C. C. A. 2), 153 F. 2d 605, p. 607.

The Government argued that the Safety Code forbade sending a longshoreman under a moving load. First, as

we have seen, Luehr did not go under a moving load. Secondly, the rule did not apply to the loading operation which was going on here. [R. 683.] The provision in the Safety Code that sling loads are not to be suspended over men's heads does not apply to loading planes on mechano decks. [R. 684.]

Finally, the rules provide that longshoremen shall take hold of the load when it reaches shoulder height. [R. 691-692.] Even if the Safety Code provisions referred to applied in this case, Luehr's actions were completely in accord with the Code.

This was purely a factual case. The trial Court heard all the witnesses except Bailey, whose deposition was read, and resolved the factual issues in favor of appellee Luehr.

See the comparable recent decision of this Court.

Kulukundis v. Strand (C. C. A. 9), No. 13229, decided March 10, 1953.

In the *Kulukundis* case, *supra,* an argument similar to the Government's was made to and rejected by this Court.

The record amply supports the trial Court's findings that the Government was negligent, that its negligence was *the* proximate cause of the accident, that Jones Stevedoring Co. was not guilty of any negligence proximately causing or contributing to the accident, and that Luehr himself was not guilty of any contributory negligence.

On the liability question, the decision of the district judge is overwhelmingly supported by the evidence and should be affirmed.

II.

Appellant United States Is Not Entitled to a Credit Against the Judgment for Compensation Paid to or Medical Services Provided Appellee Luehr.

In this case the record discloses that Luehr received compensation from the Firemen's Fund Insurance Company, his employer's compensation insurance carrier, in the amount of $3,082.20, and that medical services were provided for him by the carrier in the sum of $7,322.32. The Government is seeking to reduce the award by this amount on the basis of its so-called anti-subrogation agreement with the employer.

We do not think that this Court has the power to alter the judgment in this respect because the matter was not litigated in the Court below and was not raised by the pleadings. It is clearly evident from the decision of the trial Court that a lump sum award was made in favor of Luehr in the amount of $125,000. That award was made without regard to the compensation paid and medical services provided to Luehr. This is abundantly clear by reference to the record. The Court says:

> "Let me give you my thought on this matter. I want to sustain a judgment against the Government in relation to this $125,000.
>
> Mr. Harrison: The findings which I have proposed do that, your Honor.
>
> The Court: Now then, the other issue between you and the carrier, I am willing to give you the opportunity of having your day in court on that." [R. 720.]

Judge Roche stated that he wanted to sustain a verdict for $125,000 in favor of Luehr and leave the situation

where the Government would have its day in court to litigate the anti-subrogation claim against Firemen's Fund. That problem was none of Luehr's concern.

> "The Court: What I am trying to do is dispose of the matter at hand. I made a finding in respect to your client . . .
>
> Mr. Resner: Yes, Judge.
>
> The Court: . . . for $125,000. Now this other situation has arisen, and I think it was generally known, discussed superficially. I want you to have your day in court in relation to that. That is all." [R. 726.]

Counsel for the Government indicated that it was going to sue the Firemen's Fund and Jones on this claim.

> "The Court. All right, you are still going to sue Firemen's Fund?
>
> Mr. Harrison. We are going to sue both of them." (Jones and Firemen's Fund.) [R. 726.]

The trial Court made it very clear that it was awarding a lump sum of $125,000 to Luehr and that the anti-subrogation problem would have to be litigated separately. The following colloquy occurred:

> "Mr. Harrison: In that $125,000 I am sure your Honor intended to include all the medical expenses, both past and future.
>
> The Court: I am not prepared to say that.
>
> Mr. Harrison: The $125,000, then, is over and above . . .

The Court: Not necessarily. I tried to indicate to you—this matter was discussed and I made an inquiry, 'Do you want a lump sum judgment in this case'? And that was limited to the client. This other controversy that raised up, that will have to be litigated.

Mr. Harrison: *I agree,* but we are discussing a finding in Mr. Luehr's case, and the $125,000 includes all Mr. Luehr's items of damages, does it not? There is nothing more coming? (Emphasis ours.)

Mr. Resner: We don't say that. All we say is the judge made a general award and preserved to you, Mr. Harrison, your right to litigate out any right you may have to recover. Isn't that correct? That is what the judge said. He said he would make a lump sum award and preserve to you without prejudice." [R. 728.]

The only authority the Government counsel cites to support its position that the verdict should be reduced on account of payments of compensation and medical service is *Palardy v. United States* (E. D. Pa.), 102 Fed. Supp. 534.

In the cited case the trial Court made it clear that it was considering compensation payments and medical services in rendering the award. In our case, the Court made it equally clear that it did not regard the compensation matter as being before it. At least it was not a basis to reduce the award for Luehr, who was given a general

judgment. The record does not disclose the fact but that problem could have been posed by the pleadings in the *Palardy* case. In our case the Government made no mention in its pleadings of its anti-subrogation contract, and the point was not litigated. We do not think it can be litigated on this appeal. If anything, the Government must resolve that problem by another law suit between itself and Jones Stevedoring Co. and Firemen's Fund Insurance Co. The claim is not one against Luehr.

Finally, a person who is liable for payment of damages is not entitled to be relieved of its own liability because some other party may be liable for or have paid the same items of damage.

> *Standard Oil Co. v. United States* (C. C. A. 9), 153 F. 2d 958.

Furthermore, medical services were provided at the industrial rate, at least one half to one third lower than private rates. Had the compensation carrier not supplied this service, the Government would be liable in damages for the higher amount of private service. It is difficult to see why the Government should complain at having its damages minimized. Furthermore, the carrier was obliged to pay compensation and provide medical services or be penalized under the Longshoreman's Act. (33 U. S. C., Sec. 901, *et seq.*)

We submit that the judgment must not be reduced by the amount of compensation and medical service payments.

III.
The Damages Were Not Excessive.

The remarkable fact about Frank Luehr's case is that with the kind of accident he had and the tremendous injuries he suffered he lived to tell the tale. When one recalls that a sixty-five ton crane was required to load the airplane, that when the plane fell it was as though the falls were cut [R. 116], that the plane weighing several tons fell directly on Luehr with such force that it bounced a foot in the air after striking the mechano deck [R. 116], that Luehr, after being crushed between the plane and mechano deck, was thrown to the main deck some twelve feet below, one gets an appreciation of the great violence of the accident which this man suffered.

Ordinarily, such an accident would have produced instant death for its victim. That such did not occur here is the only fortunate result of the accident for Frank Luehr! The accident took its terrific toll upon his body, health, spirit and happiness. He is today and for the remainder of his life will be a maimed and crippled man. He will never return to his former occupation of longshoreman. He will never be able to pursue any occupation which requires physical labor, the only kind of calling in which he is experienced and for which he is qualified. He is still disabled as this brief is filed, and his condition worse than it was at the time of trial. (See discussion, *infra,* p. 50.)

He will never be without pain again. He will never walk in a normal way again. He will never be able to

enjoy the pleasures that a whole man can enjoy: hiking, running, dancing, hunting, fishing, or the many things that make life worth while—and which are enjoyed by many men of advanced years. He will never know peaceful and untroubled sleep. For the rest of his life, he will bear and suffer the scars of this tragic accident. [R. 311.]

Government counsel have attempted to minimize Luehr's injuries and disability in order to induce this Court to reduce the damage award. Rather than simply refute that argument which was made to and rejected by the trial Court, we will review the positive aspects of the medical evidence and damages as they were presented at the trial and impressed the trial Court.

Luehr was injured on July 28, 1950. Dr. Walker, the treating physician, testified that when he first saw Luehr after the accident the patient "was in a very precarious position." [R. 361.]

> "He had a compound fracture of his leg, left leg, which was giving us the most concern. We were also sure that he had a tremendous concussion injury of the chest because of his breathing and his short respiration.
>
> "We did straighten out his leg, and gave him several transfusions, and well, more or less life saving methods were the things that were used first. * * * He developed thrombo-phlebitis of both legs and a mesenteric thrombosis which gave him a paralytic ileus. * * * This thrombosis is a blood clot that occurs in the veins. His mesenteric thrombosis —that is the supporting structure to the bowel, and he developed what we call a paralyzed bowel. * * * He had interference with all the elements * * *

the kidneys, bowels, and those things. He had to have a catheter in his bladder, and he had to have rectal tubes and enemas. In other words, they were not functioning." [R. 362-363.]

"* * * We fed him by vein for approximately a week to ten days. * * * The obstruction began to clear up, his temperature went down, and he began to look like we were going to salvage—as I told him, salvage his life.

"* * * He had a fractured astragalus. * * * It means the weight bearing bone in the ankle. * * * He kept complaining of pain in his back. We knew he had a contusion of the cord, in other words, he had cord symptoms which are referrable to some of the other symptoms he had, poor coordination in his leg. His bladder was not functioning and his bowels were not functioning. * * *

"* * * He remained in the hospital and continued to improve slowly. We gave him numerous transfusions. After approximately three months we were able to get the wire out of his leg which we had tied the bones together with. They were completely denuded of skin, tibia and fibula, and we tied the bones together and bound them with a splint. In other words, the least trauma we could add to his already precarious position, the better.

"* * * (He) complained of the pain in his back. We took X-rays * * * and found * * * a fractured and compressed lumbar vertebrae, I believe L-1, but it was also posteriorally dislocated. * * * It was pushed backwards clear out of position which is the normal position of the vertebrae approximately one-half inch, which accounted for the contusion of the cord and the various cord symptoms and neurological symptoms he had." [R. 363-365.]

"* * * After approximately three and one one-half months, we were able to get him up and about on crutches and start his locomotion. * * * That was his first admission. That was up until about November 1950. Then after that he was admitted for change of cast several times, and he has also had three or four admissions to Merritt Hospital for what we call saucerization, cleaning out of the infected bone and dirt and material in this compound fracture of his leg." [R. 365-366.]

"The second time he had no covering over his leg, so he had skin flap transplants and another saucerization. * * * I did that in two procedures * * * one on the right and one on the left, and grafted skin off the other leg. * * * He was still draining in August, and we hospitalized him again and had to take out a considerable amount of bone in the sinus tract down to the marrow, into the medullary cord, and we took all the anterior cortex of the tibia." [R. 366.]

"During this time he has been up and walking with the aid of a crutch or cane, usually two crutches. He says the * * * tibia does not bother him so much, but he has pain in his left hip and in his back. He feels better and he has less muscle spasm. * * * His general health has improved markedly. His ill humor certainly is much better, and his disposition, outlook on life is better. He was very depressed and we had quite a few rounds with him to get him in shape, but his general condition is much better than it has been. He still has some other things that have to be done, but that is the picture to date." [R. 366-367.]

Appellant has attempted to deprecate Luehr's pain and permanent disability by references to the record where

in certain instances the patient did not complain of pain and by statements that various fractured bones had healed without disability. This procedure is like trying to shoot an elephant with a pea shooter. Luehr's injuries were so vast and his pain so severe that injuries which would have been major in another case were minor here.

Thus, appellant states that Luehr did not complain of pain in his hip during the first 100 days in the hospital, but neglects to state that Luehr "was lying still most of the time" [R. 299], and that he was hovering between life and death as we have noted, and in his own words, "they had me so doped up that I didn't know what I was doing, if I was coming or going * * *." [R. 298.]

There can be no question of the great severity of the back condition and the accompanying pain. Luehr, speaking of his hospital stay, testified, "As time went on I had a great big lump, almost the size of my fist, in the middle of my back; and that gave me great pain because I couldn't lie on my back, I couldn't lie on my side." [R. 298.]

The hip pain developed later. "I have also a lot of pain lower, around my hips, coming toward the front, which gives me a great deal of trouble." [R. 299.] The pain here developed because of the severe back injury, the derangement of the lumbo-sacral joint, and the fact that the entire spine was damaged and thrown out of its normal alignment. Demineralization of the bone and traumatic arthritis of the left hip joint occurred, and the left leg was shortened about three-quarters of an inch, thereby throwing the body out of balance even more. [Findings, 65-67.]

Appellant seizes a statement from Luehr that "he did not have a great deal of pain in his leg." [Br. p. 41;

R. 301.] But Luehr's complete statement was that his leg was in a cast at the time to which appellant refers, and "I couldn't bend my leg. My leg was perfectly straight." [R. 301.] Obviously pain is lessened when the injured member is held rigid by a cast to aid the healing process.

It must be apparent that Luehr suffered and continues to suffer excruciating leg pain. He had compound fractures of the tibia and the fibula in two places. At least six operations, including bone removal and skin grafts, were required on the leg. There has been and still is a dread osteomyelitis, which will remain as a permanent disability, and which (if it ever heals, which it has not done as yet) is liable to reactivation during life. The anterior cortex of the tibia is gone. The leg is so weak that the tibia was refractured since the trial, in September 1952. (See *infra*, p. 50.) In many respects, the patient is in worse condition than had he lost the leg.

Appellant relies upon certain testimony of Dr. Haldeman to support its arguments trying to minimize Luehr's disability. First, Dr. Haldeman was an examining doctor only, for the purpose of appearing as a Government witness in the case. He saw Luehr only twice. He did not have the advantage of following and treating the patient as did Dr. Walker, and of the extensive medical records and X-rays. Second, on cross-examination, it became apparent that he did not appreciate the full extent of Luehr's injuries when he made his examination. Third, he has obviously misjudged the case.

He testified that it was his opinion when he examined Luehr on November 26, 1951, that the patient would be able to engage in some type of work in three to six months.

The trial occurred in March, 1952. Luehr was then totally disabled for any kind of work. That was four months after Dr. Haldeman's examination. It is now May 1953, seventeen months after Dr. Haldeman's examination, and Luehr is still totally disabled for any kind of work, sedentary or any other kind, and for that matter is disabled for anything but the most simple activity in caring for his immediate personal needs. He is in worse condition than he was at the time of trial. Dr. Haldeman's opinion, we would say, bear little value in a determination of the medical aspects or damages in this case.

The nature and extent of Luehr's permanent disability was set forth in detail by the trial Court in the findings. [R. 65-67.] Appellant did not dispute these findings when they were submitted to the trial Court, and in fact appellant submitted the *identical* findings!

Appellant did not even cross-examine Dr. Walker, except to infer that there was some relationship between the time when Luehr's leg would be again operated upon and the trial date. At the trial, appellant tried to create the impression that a spinal fusion was not indicated. [R. 424.] In its brief, appellant concedes that a fusion was proper, because that might relieve some of Luehr's back pain. (Br. p. 44.) In short, appellant argues the medical evidence at this time in an effort to obtain a reduction in the award, and not because there is anything in the record that supports a conclusion other those reflected by the Court's findings.

Those findings are supported not only by substantial, but by overwhelming evidence. We doubt that a case has reached this Court which approaches this one for extent and severity of injuries. At least we know of none. Luehr

suffered more than twenty bone fractures. The injury to his back alone, or to his left leg alone would disable him for practically any type of gainful employment. Coupled, they leave him a cripple who can look forward only to a life of minimal activity.

The leg injury has not yet healed, and it is two months less than three years from the date of accident. The spinal fusion cannot be performed until the leg heals. [R. 402.] Since the leg has not yet healed, there is no indication when the fusion can be performed. After such a fusion, the patient would be an invalid for at least a year. [R. 403.] There is no assurance that complications will not develop. [R. 404.]

The patient can never return to stevedoring or any hard work. Everyone was agreed on that, Dr. Walker [R. 405], Dr. Haldeman [R. 423], the Court [R. 449], and even Government counsel do not dispute the fact. The argument seems to go that Mr. Luehr might do something such as being a watchman or a gateman. The argument assumes facts not demonstrated, first, that the patient will ever get well enough to do any kind of work, and second, if he ever reached a point where he was not under constant medical observation and care, and in his crippled condition, that he could obtain even the kind of work Government counsel describes for him. Certainly the Government would not employ him in such a capacity, and with the restrictions and requirements being imposed by private industry, it is highly questionable that Luehr will ever find any such employment in that quarter.

Appellant argues that Luehr "is not bedridden, has no paralysis, nor is he entirely disabled for work." (Br. p. 44.) The evidence demonstrates that Luehr is confined to his home as a cripple, and is just as disabled today for

any kind of work as he was when he lay in the hospital with his life in the balance. The statement that Luehr "has no paralysis" is one of those incomprehensible and really unthinking assertions that have marked Government counsel's attitude in this case. We find it difficult to understand what prompts such a comment. It is indeed fortunate for Mr. Luehr that he did not suffer paralysis, which well could have accompanied the injury to his spine. But the fortune which spared Luehr paralysis did not spare him a life of complete disability.

Let us again remind appellant of the Court's findings, with which it not only took no issue when they were submitted, but indeed offered as its own findings!

Finding XI tells the story.

> "It is true that libelant was hospitalized for a period in excess of 100 days immediately following his injuries and that various life saving methods were employed in order to save his life, including blood transfusions, catheters in his bladder, rectal tubes and enemas, intravenous feeding, antibiotics and other methods. It is true that libelant developed osteomyelitis of the left tibia which has required six surgical operations to date and various skin grafts and other treatment. It is true that libelant has been under the continuous treatment of a physician and surgeon from the time of said injury until the date hereof and is still undergoing active treatment.
>
> It is true that libelant has suffered permanent injuries as follows:
>
> 1. Spinal injuries which will require surgical fusion of the spine, which may relieve libelant of some future pain, but which will leave him with a permanent, serious and extensive spinal disability.

2. Spinal cord injury, resulting in scar tissue in spinal cord, which has left the spinal cord in a permanently damaged condition.

3. An active and still present osteomyelitis of the left tibia, which will require further surgical intervention and which osteomyelitis will remain as a permanent disability.

4. A portion of the anterior cortex of libelant's left tibia has been removed and libelant's left leg has been permanently shortened.

5. Traumatic arthritis of the left hip which will remain as a permanent disability.

6. Traumatic arthritis of the right ankle which will remain as a permanent disability.

7. A demineralization of the bones of the left hip, right ankle and left tibia.

8. Fractures of the left fibula which have not united and will not unite at the upper end and have united tenuously with over-riding at the lower end.

All of the said injuries caused the libelant to suffer severe and excruciating pain, suffering, distress, humiliation and anxiety and have caused libelant to lose much sleep and rest. Said permanent injuries to libelant's spine, back, left hip, left leg and right ankle presently cause and will in the future cause libelant severe, extreme and excruciating pain, suffering distress, anxiety and humiliation, and the operations which libelant will be forced to undergo in the future will cause him severe and extreme pain, suffering, worry, distress and anxiety.

It is true that libelant will be required to undergo active medical treatment for a period of approximately fifteen months after the date hereof and will

have to be treated medically for the remainder of his life for said injuries.

It is true that libelant is permanently and completely disabled for any kind of physical labor, but may possibly at some uncertain future date be able to engage in some type of sedentary occuption, requiring his brain rather than his physique. Libelant is untrained and unqualified for any kind of work other than physical labor.

Libelant was born on March 11, 1899, and at the time hereof is 53 years of age, with a life expectancy of between 20 and 21 years." [R. 65-67.]

Bearing in mind that we have a completely disabled former longshoreman, age 53 years, with a life expectancy of 20 to 21 years, we can now reveiw the damages as this factor of the case was presented to the trial Court.

The argument which Government counsel makes to this Court concerning damages was made to and rejected by the trial Court, except that at the trial, Government counsel did not even argue or offer any views concerning damages on the elements of pain and suffering, the "emotional factors," as counsel for Luehr presented and described them. Government counsel asserted an inability to evaluate these factors.

First, there was no argument but that medical expenses as of the time of trial were $7,322.32. [R. 67, Ex. 16, R. 313.]

Second, there was no disagreement that Luehr needed further and continuing medical treatment and attention. Dr. Walker testified that two weeks hospital care at $25.00 per day was needed for the then contemplated saucerization, and that a reasonable surgeon's fee would

be $250 to $300. Cost for this care, therefor, would total about $650. [R. 398.] For the spinal fusion, costs would be at least $525 for the hospital, $100 for operating room service, and $450 for a surgeon's fee, a total of $1,075. [R. 403.] These rates were computed on an industrial basis which are considerably less than private rates. [R. 403.] Since Luehr must pay these expenses himself, he would have to pay a higher private rate.

The patient would have to be followed medically for life with X-ray and physiotherapy, and other symptomatic treatment in an attempt to make him comfortable. [R. 404-405.] There might be recurrence of trouble as has already happened. If a minimum of $500 per year were allowed for life to cover the expenses of continuing care, the lifetime cost would be in excess of $10,000. Altogether, the sum of $12,000 is a minimum for future medical care and expenses.

As a matter of fact, the medical expenses have been greater than anticipated, and will probably increase. It appears that since the trial, Luehr's medical bills amount to approximately $4,740. (See *infra,* p. 50.) Nor is the end in sight. The leg has not yet healed from the September 1952 fracture. (See *infra,* p. 50.)

The spinal fusion is in the unpredictable future. Future medical expenses will undoubtedly be much greater than predicted at the time of trial. Appellant offered no contradictory evidence concerning medical expenses, past or future.

Third, wage loss at the time of trial was $7,572. The Court found that had Luehr been able to work during the period of his disability he would have earned about $7,500 as of the time of trial. That was based on the

average earnings of longshoremen in the Port of San Francisco during the period, a sum of approximately $87 per week. [Finding of Fact XIII, R. 67-68, testimony of Lester R. Paul, R. 140-143, Ex. 15.]

As a matter of fact longshoremen were earning on the average of $100 weekly in San Francisco at the time of trial [R. 143], and Luehr would have been able to earn that much because the longshore work was divided equally between all the registered longshoremen. [R. 135-136.]

The Government offered no different or contradictory evidence on earnings, but rests its argument upon Luehr's average earnings of $64 weekly during the 2½ year period prior to the trial. Such a basis is improper.

The Court was entitled to make its findings of past wage loss as well as future wage loss, not only on what the injured worker himself had earned in previous years, but what he could have earned in the industry and the probability of his earnings increasing in the future. There were two wage increases after Luehr's injury, the hourly rate increasing from $1.82 to $1.92 on September 30, 1952 [R. 141], and to $1.97 on June 18, 1951. [R. 142.]

Wage increases during the period of disability are a proper element of damages. *Guthrie v. Southern Pacific Co.* (C. C. A. 9), 180 F. 2d 295, p. 302. "After Guthrie's injuries, and before trial, wage increases actually made for men in his position would have increased his earnings by one-third * * *." Guthrie's damages were computed on the basis, not of his earnings during the last year he worked prior to injury, but on the basis of what men in his position earned during the period of his disability awaiting trial.

Using the same yardstick in our case, Luehr's wages must be computed on what his fellow workers earned during the period of his disability awaiting trial which was at least $87 per week [Finding of Fact XIII, Ex. 15], and was closer to $100 per week in the three or four month period just before trial. [R. 143.]

Fourth, concerning future wages, the presentation which counsel for Luehr made to the Court was this.

In the 15 month period from the time of trial until June of 1953, during which time there was testimony (more than substantiated by developments since the trial) that Luehr would be under active medical care and totally disabled, his wage loss was fixed at approximately $5,600 based on the $87 weekly figure. [Finding of Fact XIII.]

In the period from June of 1953 to June of 1964, when Luehr would reach the accepted retirement age of 65, a period of 11 years, Luehr would be physically incapacitated for anything but the most sedentary work. We took the position then, and we take it now, that a man untrained for anything but heavy physical labor at Luehr's age and with his disability could not be expected to find an occupation that would pay him anything but the most nominal sum.

The courts recognize the fact that a person whose occupation has been one of heavy labor is unqualified for other types of work. *Porello v. United States* (C. C. A. 2), 155 F. 2d 605, was a case of an injured longshoreman. The Court said, p. 608, "The man was incapable of any active work and there is no evidence that he had qualifications which might fit him for an office job."

Therefore, the damage award would have to be predicated upon this knowledge. We contend that Luehr's wage

loss during this 11 year period would amount to $49,500. That is based on contemplated earnings of $4,500 per year or $375 per month, a very reasonable figure based not only upon earnings in the industry but upon Luehr's own earnings in the year before the accident. In 1949, Luehr earned $4,252.07. [R. 286-287.] Part of 1949, Luehr worked in Alaska in the fishing industry, a lucrative employment to which he can never return.

Appellant argues that the loss of future earnings must be computed on the basis of work expectancy which it places at 12 years. The basic fallacy in this argument is that a working man does not ordinarily retire at age 65 or any other age for that matter, but works during his entire life time. This is being changed somewhat in the light of industry pension plans.

There is one now in the longshore industry which allows a man twenty five years in the industry to retire at age 65 with a lifetime pension of $100 monthly [R. 541] (which will undoubtedly increase with the passage of time) but Luehr will not now be able to qualify, although he would have been able to qualify had he not been injured. Luehr therefore has lost his chance of obtaining a pension. His inability to work means that he is no longer making social security contributions and he will suffer additionally on that score in smaller benefits when he reaches the age where he can claim social security benefits.

Martin Ingbrigtsen, Luehr's gang boss, testified that he was age 72 and still working as a longshoremen. [R. 539.] We think it fair to state that Luehr could be expected to work to that age or older. There are men in many walks of life, in the professions, business, and labor, who work until the seventies or eighties. A working man is

ordinarily less able to retire than those in other walks of life because he has never earned the kind of money which buys retirement.

There is no compulsory retirement age in the longshore industry for a workman in Luehr's situation. This Court recognized that damages are allowable until the retirement age. *Guthrie v. Southern Pacific Co.* (C. C. A. 9), 186 F. 2d 926, 927. There the retirement age was 70 years. *A fortiori,* if there is no retirement age, then damages are allowable on a basis of life expectancy.

That is the basis on which damages are computed in almost all cases of permanent disability. (*Cf. Guthrie v. Southern, supra,* p. 927.)

> "The previous conclusion as to present worth of the prospective earnings, were necessarily arrived at by a consideration not only of Guthrie's *life expectancy* but also of the earning power of money." (Emphasis ours.)

> "One who is injured in his person may recover for losses or diminution of his earning capacity *during his entire expectancy of life* and is entitled to such an amount as will compensate him for such loss. The proper element of damages in such case is loss of earning power, if any,—that is, the *permanent impairment of the ability to earn money.*"

> 15 Am. Jur., Sec. 91, p. 501.

> "Damages should include fair recompense for the loss of what (the plaintiff) would otherwise have earned in his trade, or profession, and has been deprived of the capacity of earning, by the wrongful act of defendant."

> *Vicksburg & Meridian R. R. Co. v. Putnam,* 118 U. S. 545, 30 L. Ed. 257, p. 258.

See also:

Pierce v. Tennessee Co. Iron & R. R. Co., 173 U. S. 143, L. Ed. 591;

De Vito v. United Airlines (D. C. N. Y.), 98 Fed. Supp. 88.

We contend that between ages 65 and 70, a period of 5 years, Luehr will lose in wages at least $3,000 a year, a total of $15,000. And then between ages 70 and 74, we contend that he will lose at least $2,000 a year or $8,000. We concede for the sake of this argument that his earnings would decline during his later years had he not been injured, although it could be argued (and the life expectancy cases are ample authority) that his earnings would continue at the full rate during his lifetime.

We conclude, therefor, that Luehr's wage loss for the period of his life expectancy is $78,000. We have not commuted the value of this wage loss because we have taken it on a declining earning basis.

If appellant wants to argue for a commutation, then the wages should be computed at the going rate in the industry at the time of trial, $100 per week or $5,200 per year. Over a life expectancy of 21 years the total wage loss would be $109,200 which commuted at 2% (rather than 3%, inasmuch as government bonds pay closer on the average to 2%, and bank interest on savings accounts ranges from 1% to 2%, and it cannot be argued that a man completely ignorant in finance such as Luehr can invest money successfully at 3%) would be $88,452.

At an interest rate of 2½% the commuted value would be $84,162 and at 3% the commuted value would be $80,158. The latter figure still is greater than the amount

we argued for on a diminishing earning basis at the commencing rate of $4,500 per year, namely $78,000. This Court indicated in the *Guthrie* case, *supra,* that it believed a 3% interest rate was proper. It is our view, as we have indicated, that a 2% interest rate is more nearly related to reality in a case such as this, but even if the 3% rate is taken, the figure which we finally come out with, based upon earnings in the industry at the *time of trial,* (which this Court indicated in the *Guthrie* case was proper) is larger by $2,000 than the amount we argued for at trial.

If the yearly wages were computed at $4,500 ($87 per week) the lifetime wage loss would be $94,500, which commuted at 2% would be $76.549, commuted at 2½% would be $72,882, and commuted at 3% would be $69,367. This latter figure is some $9,000 less than that for which we argued at the trial, and is the minimum figure which we believe would be allowable for loss of future earnings.

If Luehr's wage loss were computed at $3,400 per year (as the appellant desires) his wage loss over his life expectancy would be $71,400, which commuted at 2% would amount to $57,837, commuted at 2½% would be $55,029, and at 3% would be $52,411. This latter amount is still more than twice as much as the figure of $24,134 which appellant argues to be the maximum loss of future earnings. (Br. p. 38.)

The argument which appellant makes to this Court concerning wage loss was made by it to the trial Court, which found the argument unconvincing and rejected it.

It is improper to make deductions for income taxes or exemptions as appellant argues. Such deductions are too conjectural.

See:

Stokes v. United States (C. C. A. 2), 144 F. 2d 82;

Chicago & N. W. Ry. v. Curl (C. C. A. 8), 178 F. 2d 497, 502;

Cf. Guthrie v. Southern Pacific Co. (C. C. A. 9), 186 F. 2d 926, 928.

Furthermore, appellant makes no allowance at all for inflation and the depreciating value of the dollar. Dollar value has decreased steadily in the past twenty five years. One of the reasons that judgments in damage cases have increased is because the Courts recognize that a dollar will not buy today what it did twenty, ten, five or even two years ago.

> "The fact that the value of the dollar has greatly depreciated since the accident may be taken into consideration by the jury, in estimating the damages for personal injuries, and by a reviewing court in determining whether the amount awarded is excessive."
>
> 15 Am. Jur., Sec. 71, p. 481.

In *Naylor v. Isthmian S. S. Co.* (D. C. N. Y.), 94 Fed. Supp. 422, the trial Court judge, in upholding a verdict of $115,000, commented on the purchasing power of the dollar:

> "This then is the standard. I cannot find any intemperance, passion, partiality nor corruption on

> the part of the jury. It worked earnestly and intently on the case. *It had the right to consider the present purchasing power of the dollar.* It had no yardstick save its own cumulative conscience."

In *Kircher v. Atchison, Topeka & Santa Fe R. R.*, 32 Cal. 2d 176, 187, the Court said:

> "It is a matter of common knowledge and of which judicial notice may be taken that the purchasing power of the dollar has decreased to approximately one-half what it was prior to the present inflationary spiral and the trier of the fact should take this factor into consideration in determining the amount of damages necessary to compensate an injured person for the loss sustained as the result of the injuries suffered."

On the question of pain and suffering, the argument presented to the trial Court was something like this: injuries of the extent and severity suffered by Luehr cannot be compensated for in mere money. It is at once apparent that no amount of money could compensate this man for the tremendous pain, suffering, agony and misery that he has endured, is still enduring, and will endure during the remainder of his life. We have said before, but we believe it bears repeating, that there are only very few cases where an injured worker suffered the kind of injuries Luehr suffered and lived to tell the tale. He is for all intents and purposes a bedridden and house confined cripple. The future offers no surcease from this situation. No amount of money will compensate this man for what this tragic accident has done to him.

However, the law says that there must be an award for pain, suffering, agony and the many other elements

which go to make up what we described as the emotional factors in this case.

"There is no standard for the admeasurement for damages for pain and suffering."

National Bulk Carriers v. Hall (C. C. A. 5), 152 F. 2d 658, 1946, A. M. C. 64.

"In an action for personal injuries, the plaintiff is entitled to compensation for his physical pain and suffering directly or resulting from the wrongful acts of the defendant, including pain and suffering incident to a surgical operation or medical treatment.

"Pain and suffering have no market price. They are not capable of being exactly and accurately determined, and there is no fixed rule or standard whereby damages for them can be measured. Hence, the amount of damages to be awarded for them must be left to the judgment of the jury, subject only to correction by the courts for abuse and passionate exercise. The award for pain and suffering must be limited to compensation. However, compensation in this connection is not to be understood as meaning price or value, but as describing an allowance looking toward recompense for, or made because of, the suffering consequent upon the injury. The question in any given case is not what sum of money would be sufficient to induce a person to undergo voluntarily the pain and suffering for which recovery is sought or what it would cost to hire someone to undergo such suffering, but what, under all the circumstances, shoud be allowed the plaintiff in addition to the other items of damage to which he is entitled, in reasonable consideration of the suffering necessarily endured. The amount allowed must be fair and reasonable, free from sentimental or fanciful standards, and based upon the facts disclosed. In making the esti-

> mate the jury may consider the nature and extent of the injuries and the suffering occasioned by them and the duration thereof." (15 Am. Jur., Sec. 72, pp. 481-483.)

This Court, in the *Guthrie* case, *supra,* itself recognized that there was no true measurement for damages on account of pain and suffering. The Court held that $40,000 for pain and suffering on account of the loss of a leg to a 58-year old railroad workman was too high, but held it was without power to revise the judgment.

In *Naylor v. Isthmian S. S. Co., supra,* $40,000 for ten hours pain and suffering was held not to be excessive. The seaman in the *Naylor* case died after ten hours of intense pain and suffering. In that case the Court said, 94 Fed. Supp., p. 424:

> "The pain inflicted on an individual which is caused by the wrongdoing of another is no less to a poor man than to a millionaire. It is most difficult to assess in the absence of intemperance, passion, partiality, or corruption—and there is none evident in this case—I am not one to say that terrific pain inflicted on a seaman for ten hours is not worth $40,000—when a jury of free men and women calmly, carefully and deliberately so decide."

See the same case on appeal, *Naylor v. Isthmian S. S. Co.,* 187 F. 2d 538, 541.

One must remember in this case that Luehr hovered between life and death for many weeks after receiving injuries in a type of accident which would have killed in 999 cases out of 1,000. Life saving methods were at first

employed. He suffered a tremendous concussion injury of the entire chest. He originally had a paralytic ilias, and cord symptoms, resulting in an incontinence of bowel and bladder. He had thrombo-phlebitis of both legs. Numerous blood transfusions and other life saving methods were employed. He was fed intravenously. He was administered constant drugs to relieve his pain. He did not know whether he was "coming or going."

He had a tremendous left leg injury, a compound comminuted fracture of the tibia, and two such fractures of the left fibula. The bones had to be wired together; they were shorn of skin and flesh. The osteomyelitis which developed did not respond to seven operations and the leg is so weak that it suffered a spontaneous fracture September last.

There was a tremendous compression fracture of the first lumbar vertabrae with anterior wedging, and posterior displacement about one-half inch into the spinal canal. We have already observed how remarkable it was that a permanent paralysis did not develop. Luehr suffered a complete derangement of the lumbo-sacral joint, and almost complete collapse of the interspace between the fifth lumbar and first sacral segments. There were fractures of the laminae, transverse and spinous processes of various lumbar vertebrae. The left leg is shortened by three-quarters of an inch.

There was an oblique fracture of the right clavicle; there was an avulsion fracture of the right astragalus.

There was a decalcification or demineralization of the bones of the left hip, right ankle, and left tibia. Traumatic arthritis has developed in the left hip.

When one contemplates this list of injuries—more than 20 bone fractures, and enormous injury to the nervous and venous systems and the soft tissues, one may get some small comprehension of the immense psychic and emotional shock that these injuries have produced upon Frank Luehr. That he has not collapsed completely emotionally is a tribute to his spirit and perseverence. None the less, these injuries themselves must tell the story of the pain and suffering this human being has undergone.

We have searched in cases in this circuit but we have found none where the injuries compared in magnitude or extent to those of Luehr. Certainly the injuries suffered by Guthrie in the loss of a leg were tremendous, but even that injury does not compare to what we have here. We realize that it is very hard to compare cases, and that the pain and suffering which one man may suffer will not trouble another, while in still another person it may be even more severe.

But in the law books and in the decided cases, it seems that the courts do make comparisons of cases and by comparison with any case we know, we assert without hesitation that the injuries to Luehr demand more by way of compensation for pain and suffering than any other case we know.

In the trial Court we argued that the pain and suffering which Luehr had undergone until the time of the trial justified damages in the amount of $35,000. We took the position that the injuries to the spine and back justifies damages at least in the amount of $15,000 and that the injuries to the left leg and hip justified damages in a further sum of at least $15,000. All the other injuries, we stated, justified damages of $5,000, making the total stated.

With regard to the future, we noted that Luehr had a life expectancy of 21 years. We argued that his damages for pain and suffering over his future lifetime would be at least $2,500 a year, or $52,000 over his life expectancy. This would amount to approximately $7.00 a day. Can anyone argue that $7.00 a day is too much to compensate one who must go through life the crippled and broken man that Frank Luehr is and will remain. Certainly, in the words of Judge Stephens of this Court, in the *Guthrie* case, 186 F. 2d p. 934, "There can be no monetary figure which really compensates for the loss of a limb and for the pain and suffering, both past and in the future, deriving therefrom."

In the light of the injuries suffered in this case, can it be stated that a total of $87,000 for pain and suffering, past and future, is too much? It is our view that both on the basis of the record in this case and by comparison to the decided cases, such a figure would be only reasonable.

However, it is at once apparent when one considers the total judgment of $125,000 that the trial Court did

not award any such figure as we asked for on account of pain and suffering. The damages, as we totalled them and argued our belief that the case justified them in the Court below, was the sum of $192,000. Judge Roche awarded some $67,000 less than we felt the evidence justified.

That verdict of Judge Roche is now under attack here by the Government as being excessive. It is our view that the judgment is not only not excessive but that it should be greater.

To summarize, the medical expenses as of the time of trial were $7,322.32. The future medical expenses will come to at least $12,000. The wage loss until the time of trial was $7,572. The medical expenses and wage loss therefore total approximately $27,000. That leaves $98,000 by way of general damages. The future wage loss must be at least $52,000 and more reasonably $78,000. If the former figure is taken as the wage loss, then the damages for pain and suffering in this case would amount to $48,000. If the latter figure is taken, then the damages for pain and suffering would amount to approximately $22,000. However one views the computations and money figures in this case, it is our belief that the award not only for future wage loss but for pain and suffering was most reasonable.

None of the amounts which go to make up items of general damages can be computed with mathematical certainty. Necessarily there are many variable factors which go into a consideration of these items. All that one

can do is to regard the case in its whole light to reach an equitable and fair conclusion.

The Government, in its brief, has cited cases (Br. pp. 45-55) attempting to demonstrate that the damages in our case were excessive. In none of those cases did the injured person suffer injuries or disability anywhere approaching or approximating that of Luehr. Every case must be decided on its own facts. None of the cases cited by the Government can affect the result here because none of those cases compare to this case.

On the other hand, there are many cases where damages were awarded in sums larger than in this case. See, for example:

Kieffer v. Blue Seal Chemical Co. (C. C. A. 3), 196 F. 2d 614. An award of $250,000 for third degree facial burns, blindness, except for 25% vision in one eye, and a permanently disfigured face;

Summerville v. Smucker, 113 N. Y. S. 2d 868, judgment for $195,888, reduced by remittitur to $100,000, a death case;

Nives v. City of New York, 109 N. Y. S. 2d 556, verdict for $160,000, serious leg and other injuries;

De Vito v. United Airlines, supra, verdict of $300,000, cut to $160,000, death case;

Florida Power & Light Co. v. Watson (Fla.), 50 So. 2d 543, $260,000 damages for crushed pelvis, severance of urethra and other severe injuries;

Smith v. Illinois Central R. R. (Ill. App.), 99 N. E. 717, $185,000 damage verdict, loss of both legs mid thigh, back injury, other injuries;

Trobridge v. Simonds Abrasive Co. (C. C. A. 3), 190 F. 2d 825, verdict for $126,182.44. Forty-four year old plaintiff suffered severe leg injuries when an abrasive wheel shattered; he was hospitalized for 14 months and amputation of one or both legs remains a possibility;

Sunray Oil Corp. v. Allbritton (C. C. A. 5), 187 F. 2d 475, $125,000 verdict for roustabout with serious back and lung injuries sustained when an oil derrick collapsed.

There are many other cases reported and unreported wherein what are seemingly large judgments have been awarded and paid, or sustained on appeal. Naturally all of those cases, as our case, stand on their special facts. For a review of many such cases see 10 N. A. C. C. A. Law Journal, pages 265-283; 9 N. A. C. C. A. Law Journal, pages 247-264; 8 N. A. C. C. A. Law Journal, pages 230-241; 7 N. A. C. C. A. Law Journal, pages 221-231; 6 N. A. C. C. A. Law Journal, pages 198-211.

On the basis of not only the record in this case but also many comparable cases in other jurisdictions, we conclude that the verdict rendered by the trial Court in this case was not excessive.

IV.

The Verdict Not Being the Result of Passion or Prejudice, and Being Supported by Substantial Evidence, the Appellate Court Will Not Substitute Its Judgment for That of the Trial Court.

It is true that this is an appeal in admiralty, and this Court may consider the case *de novo*. However, there is a long line of cases in this circuit holding that where the trial Court has heard the witnesses in person (as occurred here, except for the witness Bailey on the liability question) it will not interfere with the trial Court's decision where it is based upon substantial evidence and the findings are not clearly erroneous. (*Kulukundis v. Strand* (C. C. A. 9), No. 13229, decided March 10, 1953, and cases therein cited.

On the liability question, it offers no argument but that the Government was negligent, and the record is abundant that the appellee Luehr was free of contributory negligence. On this score, there is no basis to alter the result reached below.

On the anti-subrogation point, that the Government is entitled to a credit for compensation paid to and medical attention provided Luehr by his employer's compensation carrier, it is evident that the trial Court preserved the Government's right to litigate that question in another proceeding, inasmuch as it was neither raised by the pleadings or litigated in this case. The trial Court gave Luehr a lump sum award, and the Government did not object to such a procedure. The monies paid Luehr by the compensation carrier were not necessarily considered by the trial Court in reaching its verdict. Accordingly,

that question is not before this Court on this appeal. Furthermore, the Government is not in a position to relieve itself of a liability because a third person may have paid monies which it otherwise must pay.

That leaves the damage question. This Court in the *Guthrie* case, *supra,* held that in a law case it was without power to require a new trial, and therefore without power to issue a remittitur reducing damages. It would seem that the principles controlling here should be no different. "A long list of cases in the federal courts demonstrates clearly that the federal appellate courts, including the Supreme Court, will not review a judgment for excessiveness of damages even in cases where the amount of damages is capable of much more precise ascertainment than it is in a personal injury case." *Guthrie v. Southern Pacific Co.,* 186 F. 2d at p. 928.

In an admiralty appeal, *Carroll v. United States* (C. C. A. 3), 133 F. 2d 690, 1943 A. M. C. 690, the Court held it would not reduce a damage award even though it was larger than that Court would have made.

Cf.:

Pariser v. City of New York (C. C. A. 2), 146 F. 2d 431, 1945 A. M. C. 133;

Southern Ry. Co. v. Bennett, 233 U. S. 80, 58 L. Ed. 860;

Miller v. Maryland Casualty Co. (C. C. A. 2), 40 F. 2d 463.

We submit that this case is one where the Appellate Court should not substitute its judgment for that of the trial Court. The case was fairly tried below, there was substantial evidence to support the verdict on every aspect of the case, and there is no basis for reversal.

V.

The Damages Should Be Increased on Appeal.

"An appellate court may increase an award in admiralty."

Porello v. United States (C. C. A. 2), 153 F. 2d 605, p. 608.

See also:

Standard Oil Co. v. Southern Pacific Co., 268 U. S. 146, 69 L. Ed. 890;

The Spokane (C. C. A. 2), 294 Fed. 240, cert. den., 264 U. S. 583;

Drowne v. Great Lakes Trans. Corp. (C. C. A. 2), 5 F. 2d 58.

In the preceding discussion concerning damages, we pointed out that we had asked the trial Court for an award of $192,000. We think such an award is justly deserved by the evidence as reviewed herein.

However, since the trial, developments have occurred which justify an increase in the award. Luehr suffered a spontaneous fracture of the left tibia at the old fracture site in September, 1952, approximately six months after the trial. He was treated by Dr. Walker for that new fracture. He was in Merritt Hospital from September 4 until September 11, 1952, where a closed reduction was accomplished and a long cast was applied (see *infra,* p. 51, report of Dr. Harry R. Walker of November 3, 1952).

As of March of this year, one year after the trial, Luehr's most recent leg fracture is not yet healed and he is still recuperating (see *infra,* p. 53, report of Dr. Harry R. Walker, dated March 17, 1953).

It becomes apparent at once that Luehr not only has not recovered from the leg injury but that it has become worse. From Dr. Walker's report it will be noted that the patient's other injuries are without improvement.

Luehr has endured greater pain and suffering since the trial than was anticipated. The operation on his spine has not yet been performed and the terrific back pain still remains. It cannot be stated with any certainty when the spinal operation can be performed.

The medical expenses since the trial have amounted to $4,740.88—almost $5,000. At the trial it was estimated that future medical expenses would be $12,000. It is apparent that this estimate was too conservative.

It is also apparent that Luehr will not do any kind of work in the future, even the most sedentary. We believe, therefore, that an award of damages in the amount of $192,000, as requested in the trial Court, is proper and that such an award should be made by this Court on appeal.

Conclusion.

For all of the reasons stated in the foregoing brief, it is our belief that the judgment on liability should be affirmed, that the anti-subrogation point is without merit; that the damages awarded below are not excessive; and that there should be an increase in damages awarded on this appeal.

Dated: May 15, 1953.

Respectfully submitted,

HERBERT RESNER,

RAOUL D. MAGANA,

Proctors for Appellee Luehr.

Motion for Leave to Take New Testimony on Appeal. (Admiralty Rules 7 and 8)

To the Judges of the above entitled Court and to Messrs. Keith R. Ferguson, Special Assistant to the Attorney General, and J. Stewart Harrison, Attorney, Department of Justice, Attorney for Appellant:

Appellee, Frank Luehr, prays leave of Court to have additional testimony and new evidence taken on this appeal on the questions of appellee's physical condition, medical treatment, present opinions of the doctors as to his physical condition and future course, and damages with regard to medical expenses.

This motion is based upon the entire record in this case and upon the affidavit of Herbert Resner, proctor for appellee, Frank Luehr, filed herewith.

Wherefore, appellee prays that this Court issue an order to appellant to show cause why such evidence should not be received on this appeal.

Dated: May 15, 1953.

HERBERT RESNER,
RAOUL D. MAGANA,
Proctors for Appellee Luehr.

Affidavit of Herbert Resner.

State of California, County of Los Angeles—ss.

Herbert Resner, being first duly sworn, deposes and says:

I am one of the proctors for appellee Frank Luehr. Since the trial in this case Frank Luehr has suffered several physical relapses, particularly a refracture of the left leg in September, 1952. In that connection affiant attaches hereto, and makes a part of this affidavit, a report of Dr. Harry R. Walker, Luehr's treating physician, dated November 3, 1952, and marked Exhibit "A"; and a report of Dr. Harry R. Walker, dated November 17, 1953, and marked Exhibit "B".

Affiant is informed by his client that the medical expenses since the trial amount to a total of $4,740.88. Those bills are for hospital treatment, doctor's services, medicines, X-rays, and other medical expenses.

Luehr was a patient in Merritt Hospital from March 25 through May 3, 1952; and again, from September 4 through September 11, 1952. Dr. Walker's bills are attached hereto as follows: November 3, 1952, Exhibit "C," and March 17, 1953, Exhibit "D."

Wherefore, affiant prays that this court order the taking of additional testimony on the matters specified herein.

HERBERT RESNER,
Proctor for Frank Luehr.

Subscribed and sworn to before me
this 19th day of May, 1953.

BETTY LEE RESNER,
Notary Public in and for the County of Los Angeles, State of California.

My Commission expires March 19, 1955.

EXHIBIT A

Douglas D. Toffelmier, M. D.
Harry R. Walker, M. D.
354 Twenty-first Street
Oakland 12, California

November 3, 1952.

Law office of
Mr. Herbert Resner,
458 So. Spring Street,
Los Angeles, California.

Dear Sir:

Re: Mr. Frank Luehr,
2529 Grove Street,
Oakland, California.

The above-captioned patient has continued to report to this office regularly since our last conference. About September 2nd or 3rd, however, the patient was at home and re-fractured the left leg at the site of his old fracture. He was taken by ambulance to the Merritt Hospital, where a closed reduction was accomplished and a leg cast was applied. He was dismissed from the hospital on 9-11-52 and has carried on his convalescence at home. On 10-13-52, the cast was changed, and check X-rays were taken by Dr. Herman Jensen, which revealed that there appears to have been a recent fracture through the extreme distal end of the old comminuted proximal shaft tibial fracture with some anterior medial bowing at the fracture site. The fibula at the corresponding level reveals

nonunion with smooth terminal margins. The fracture through the distal fibula, which is well united and retrabeculated with a spur is visualized. The articulating surfaces at the knee joint appear smooth with some deossification present.

At present the extremity is encased in a long leg walking cast and the patient is ambulatory on crutches. If given more time, this fracture will unite.

Insofar as his other injuries are concerned, there is no change in them since our last conference, and his permanent disability has not changed any. As to the present fracture, it would be my opinion that this will require another two or three months before it will be united solidly.

Very truly yours,

HARRY R. WALKER, M. D.
Harry R. Walker, M. D.
Douglas D. Toffelmier, M. D.

HRW FS

EXHIBIT B

Douglas D. Toffelmier, M. D.
Harry R. Walker, M. D.
354 Twenty-first Street
Oakland 12, California

March 17, 1953.

Mr. Herbert Resner,
Attorney at Law,
Suite 329 Rowan Bldg.,
450 South Spring Street,
Los Angeles 12, California.

Dear Mr. Resner: *Re: Frank Luehr.*

This will acknowledge receipt of your letter of 3-13-53. The recent fracture of the left tibia has slowly united so that there is now sufficient callusto allow for full weight bearing and the patient is able to get around with the aid of a brace and cane. It would be my opinion that he will require another three to four months before there will be solid bony union.

Check X-rays taken of the left extremity on 3-6-53 were interpreted as follows:

Again the old fractures through the proximal shafts of tibia and fibula with the re-fracture through the more distal part of the fracture bed of the tibia is demonstrated. There has been no apparent change in alignment and relationship so far as memory serves. Considerable callus is developing in the recent fracture bed and more in the old

fracture bed. Non-union still persists in the proximal fracture of the fibula. The oblique fracture through the distal fibula is well healed and retrabeculated.

The patient's other injuries are much the same as disclosed in our previous reports.

Very truly yours,

HARRY R. WALKER, M. D.
Harry R. Walker, M. D.
Douglas D. Toffelmier, M. D.

HRW FS

EXHIBIT C

Douglas D. Toffelmier, M. D.
Harry R. Walker, M. D.
354 Twenty-first Street
Oakland 12, California

March 17, 1953.

Mr. Frank Luehr,
2529 Grove Street,
Oakland, California.

For services rendered as follows:

Previous billings as reported to Mr. Herbert Resner, Attorney at Law, Suite 329 Rowan Bldg., 458 South Spring Street, Los Angeles 13, California, through October, 1952			$434.75
11-7-52	Office Visit		5.00
11-17-52	"	"	5.00
11-19-52	"	" and application of long leg cast	17.50
11-22-52	"	" " adjustment of cast	7.50
12-2-52	"	" " window and padding of cast	7.50
12-9-52	"	"	5.00
1-6-53	"	"	5.00
1-20-53	"	" removal of cast and appl. of boot	11.50
2-2-53	"	"	5.00
2-9-53	"	" and ace bandage	6.50
2-20-53	"	"	5.00
3-6-53	"	"	5.00
			$520.25

Copy to Mr. H. Resner

EXHIBIT D

Douglas D. Toffelmier, M. D.
Harry R. Walker, M. D.

354 Twenty-first Street
Oakland 12, California

November 3, 1952.

Law Offices of
Mr. Herbert Resner,
458 So. Spring Street,
Los Angeles, California.

For account of Mr. Frank Luehr,
2529 Grove Street,
Oakland, California.

The following is a statement of the above account since April, 1952, which remains unpaid to date:

Services 4-25-52 through 5-27-52 (previously submitted)	$184.00
Services 6-2-52 through 6-24-52 (previously submitted)	34.50
7-1-52 Office visit and ace bandage	6.75
7-11-52 " " " " "	5.00
7-16-52 " " " " "	6.75
7-22-52 " "	5.00
8-7-52 " " " " "	6.75
8-26-52 " "	5.00
9-3-52 " "	5.00
9-4-52 Surgery—Merritt Hospital—Refracture of leg.	100.00
9-5, 6, 7, 8, 9, 10, 11 Hospitals visits (7 @ $5.00)	35.00
9-16-52 Office Visit	5.00
9-30-52 " "	5.00
10-13-52 " ", removal of cast and reapplication	17.50
10-17-52 " " and application walking heel	8.00
10-28-52 " "	5.00
Total to date.	$434.75